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Nos. 07-588, 07-589 & 07-597

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In The
Supreme Court of the United States

ENTERGY CORPORATION, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

PSEG FOSSIL LLC AND PSEG NUCLEAR LLC,
Petitioners,

v.

RIVERKEEPER, INC., ET AL., *Respondents.*

UTILITY WATER ACT GROUP, *Petitioner,*

v.

RIVERKEEPER, INC., ET AL., *Respondents.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR THE STATES OF RHODE ISLAND, CONNECTICUT, DELAWARE, NEW JERSEY, NEW YORK AND THE COMMONWEALTH OF MASSACHUSETTS

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ISSUES PRESENTED

1. Whether the Second Circuit, consistent with the opinions of other circuit courts, correctly interpreted the plain language of the Clean Water Act to preclude the use of a cost-benefit analysis as the basis for the Environmental Protection Agency's "best technology available" determination under section 316(b), and properly remanded the Phase II rule for further explanation of the cost considerations relied upon by the Environmental Protection Agency in setting the technology standards.

2. Whether the Second Circuit, consistent with the opinions of other circuit courts, correctly interpreted the plain language of the Clean Water Act to preclude the provisions of Phase II rule that allow existing power plants to comply with section 316(b) by substituting restoration measures for technology at the cooling water intake, and properly remanded the restoration provisions to the Environmental Protection Agency.

3. Whether the Second Circuit, consistent with the opinions of other circuit courts, correctly decided that the technology requirement in section 316(b) of the Clean Water Act applies to both new and existing facilities, and that those requirements may be implemented through discharge permits.

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RESPONDENT STATES' BRIEF IN OPPOSITION

The States of Rhode Island, Connecticut, Delaware, New Jersey, and New York and the Commonwealth of Massachusetts submit this brief in opposition to the certiorari petitions filed by Entergy Corporation, Utility Water Act Group ("UWAG"), and PSEG Fossil LLC and PSEG Nuclear LLC ("Industry Petitioners") seeking review of the unanimous decision of the United States Court of Appeals for the Second Circuit.[1] The Second Circuit invalidated and remanded various aspects of a rule promulgated by the United States Environmental Protection Agency ("EPA") to regulate cooling water intake structures at certain power plants under the federal Clean Water Act. The Industry Petitioners unsuccessfully sought rehearing and consideration *en banc* below. EPA did not seek rehearing in the Second Circuit and has not sought this Court's review. Instead, EPA reopened its rulemaking proceedings to address the remanded provisions identified by the Second Circuit. The States submit this brief as a consolidated opposition to the petitions.

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[1] *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007) ("*Riverkeeper II*"), App. 1a-94a (all references to "App." are to Petitioner Entergy's Appendix).

STATEMENT

Section 316(b) of the Clean Water Act

When cooling water intake structures at existing power plants withdraw significant amounts of water from associated water bodies, they impinge and entrain large quantities of fish and fish larvae. This can have severe consequences on aquatic life and ecosystems. Section 316(b) of the Clean Water Act directs EPA to establish technology requirements for these intake structures at power plants that use water to cool their electricity-generating equipment. In a single sentence, section 316(b) provides that "[a]ny standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. §1326(b), App. 112a-13a. In other words, discharge permits and other standards applicable to new and existing point sources should also control intake structures with technology-based requirements.

In 1995, EPA entered a consent decree requiring it to create regulations to implement section 316(b). The consent decree, as amended, required EPA to draft the regulations in three phases.[2] Phase I of the

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[2] *See Cronin v. Browner*, 90 F.Supp.2d 364 (S.D.N.Y. 2000); Phase I (new electricity generating facilities), 66 Fed. Reg. 65,256 (Dec. 18, 2001), codified at 40 C.F.R. Section 125.80

rulemaking, which applied to cooling water intake structures at new facilities, was challenged in the Second Circuit by environmental groups and various industry petitioners. The Second Circuit upheld most of the Phase I rule, but remanded EPA's restoration provision, which allowed power plants to use restoration measures in lieu of technology, as "plainly inconsistent with the statute's text." *Riverkeeper, Inc. v. EPA* ("*Riverkeeper I*"), 358 F.3d 174, 181, 189 (2d Cir. 2004). *Riverkeeper I* was not appealed, and, is final. *Riverkeeper II* and the pending industry petitions for certiorari concern Phase II of the EPA rulemaking. In 2006, EPA promulgated Phase III of the rule, which is not the subject of this challenge.

The Phase II rule

EPA issued its final rule pursuant to the second phase of the consent decree on July 9, 2004 ("the Phase II rule"). The Phase II rule is a unique agency rule designed to implement section 316(b), and is limited in its application to one specific activity – the intake of water at structures used at power plants

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et seq., *see Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 189-91 (2d Cir. 2004) ("*Riverkeeper I*"); Phase II (electric power plants built before 2002 that withdraw over 50 million gallons per day of cooling water), 69 Fed. Reg. 41,583, codified at 40 C.F.R. Pts. 9, 122-25, *see Riverkeeper II*; and, Phase III (existing power plants and industrial facilities not subject to Phase II), 71 Fed. Reg. 35,006 (June 16, 2006), codified at 40 C.F.R. Section 125, Subpart N, *see ConocoPhillips, et al. v. EPA*, No. 06-60662 (and consolidated cases) (5th Cir. 2006).

built before 2002 that withdraw 50 million gallons of water per day or more, of which at least twenty-five percent is used for cooling. *See Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities*, 69 Fed. Reg. 41,576 (July 9, 2004) (codified at 40 C.F.R. Pts. 9, 122-25), App. 122a-540a. *Riverkeeper II* is the first decision to address section 316(b) regulations as applied to existing facilities.

The Phase II rule identified various options for power plants to meet the statute's requirement that the plants use the "best technology available to minimize adverse environmental impacts." 33 U.S.C. §1326(b), App. 112a-13a. EPA then used these selected methods to establish performance standards keyed to required percentage reductions in fish kills associated with intake structures.[3] The Phase II rule provided existing facilities with five separate options to demonstrate compliance with the performance standards established in the rule. *See* 40 C.F.R. §125.94(a), App. 555a. While it does not require existing power plants to install closed cycle cooling systems, the Phase II rule provides that the installation of a closed cycle cooling system or one that reduces inflow commensurate with such a cooling system will be considered in compliance with the rule.

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[3] The Phase II rule establishes as a national performance standard reduction of impingement mortality for all life stages of fish and shellfish by 80 to 95 percent. Certain facilities are also required to reduce entrainment for all life stages of fish and shellfish by 60 to 90 percent.

Alternatively, facilities can comply with the rule by installing one or more of a "suite" of technologies – including fine- and wide-mesh wedgewire screens, aquatic filter barrier systems, barrier nets, and fish return systems – that meet national performance standards. Several of the compliance options allow a facility to meet the national performance standards through the use of restoration measures, such as improving the habitat surrounding the intake structure. *Riverkeeper II*, 475 F.3d at 108, App. 13a-14a.

Each of the compliance options in the rule was either based on EPA's "best technology available" determination, which was remanded, or on EPA's authorization of the use of restoration measures to meet the standard, which was rejected and remanded. While EPA addresses the Second Circuit's remand order and until it promulgates a new Phase II rule consistent with *Riverkeeper II*, none of the compliance options identified in the rule are presently operative.

The Second Circuit's Decision in *Riverkeeper II*

In *Riverkeeper II*, the States, environmental groups, and Industry Petitioners challenged various aspects of the Phase II rule. In that context, the Second Circuit's opinion addressed a number of issues. Industry Petitioners seek to raise three of those issues again here. Specifically, Industry Petitioners seek review of the Second Circuit's conclusions regarding:

(i) the cost-benefit analysis EPA used to select the "best technology available" ("BTA"); (ii) EPA's authorization of the use of restoration methods in lieu of BTA; and (iii) whether section 316(b) applies to existing facilities, and, in turn, whether it can be implemented through the Clean Water Act's pollution discharge provisions.

As to whether costs may be considered by EPA in selecting the "best technology available" for cooling water intakes, the Second Circuit did not hold that costs are irrelevant to a BTA determination. Rather, the court held that an ordinary interpretation of section 316(b) "does not permit the EPA to choose BTA on the basis of cost-benefit analysis." *Riverkeeper II*, 475 F.3d at 101, App. 29a. The Second Circuit agreed with EPA that the cross-reference to sections 301 and 306 "invites EPA to consider those sections when establishing BTA for cooling water intake systems." *Riverkeeper II*, 475 F.3d at 97, citing *Riverkeeper I*, 358 F.3d at 186, App. 20a. The court's review of section 316(b), therefore, was "informed by the two provisions it cross-references, CWA sections 301 and 306." *See Riverkeeper II*, 475 F.3d at 102, citing *Riverkeeper I*, 358 F.3d at 195, App. 20a (the court explaining that, "[s]ection 301 sets forth a framework under which limitations on the discharge of pollutants from existing sources would become more stringent over time.")

Section 301 of the Clean Water Act provides that all effluent discharge limitations established before March 31, 1989, require the application of the "best

practicable control technology currently available" ("BPT"). *See* 33 U.S.C. §1311(b)(1)(A), App. 97a. BPT determinations were to be made by the Administrator of EPA in consideration of factors referenced in section 304(b)(1)(B) of the Clean Water Act. *See* 33 U.S.C. §1314(b)(1)(B), App. 105a. In contrast, all effluent limitations established for point sources after March 31, 1989, were to apply "the best available technology economically achievable . . . , which will result in the reasonable further progress toward the national goal of eliminating the discharge of all pollutants ("BAT")." *See* 33 U.S.C. §1311(b)(2)(A), App. 98a-99a. The statute directs that BAT determinations are to be made by the Administrator of EPA in consideration of factors referenced in section 304(b)(2)(B). Section 304 identifies one set of factors to be considered for technology determinations for existing facilities pre-1989, and those factors allow for a comparison between costs and benefits. It identifies an entirely separate set of factors to be considered for technology determinations for existing facilities post-1989, and those factors conspicuously do not include the factor requiring a cost to benefit analysis, and instead list only the factor of cost. *See* 33 U.S.C. §1314(b)(2)(B), App. 106a-07a.

With this framework in mind, the court held "the EPA's interpretation of section 316(b) problematic because its construction significantly resembles the less stringent, now obsolete, BPT standard of section 301(b)(1)(A)." *Riverkeeper II*, 475 F.3d at 102, citing *Riverkeeper I*, 358 F.3d at 195, App. 30a. Ultimately,

the court rejected the cost-benefit analysis because it was precluded both by the plain language of section 316(b) and by the plain language of the cross-referenced sections. In any event, the Second Circuit could not discern EPA's basis for its BTA selection in either the language of the Phase II rule itself or the administrative record. Thus, the Second Circuit remanded the Phase II rule to EPA to clarify the role and extent that any cost-benefit analysis, or other cost considerations played in EPA's BTA determination. *Riverkeeper II*, 475 F.3d at 103, App. 33a ("it is unclear whether the Agency improperly weighed the benefits and the costs of requiring closed-cycle cooling. . . . Given the above indications that the EPA engaged in a cost-benefit analysis, we remand for the EPA to explain its conclusions.") In light of the remand, the practical significance of the Court's rejection of EPA's cost-benefit analysis, and the effect, if any, that the opinion will have on EPA's BTA determination is unclear.

Riverkeeper II also invalidated the restoration provisions in the Phase II rule, and remanded those provisions to EPA. The Second Circuit reached the conclusion that restoration measures are not authorized by section 316(b) in step-one of the *Chevron* analysis. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court found first that language in section 316(b) established nexus between certain characteristics of the intake structure and the selected technology. *See Riverkeeper II*, 475 F.3d at 109, quoting *Riverkeeper I*,

358 F.3d at 189, App. 46a-47a ("[r]estoration measures are not part of the location, design, construction, or capacity of cooling water intake structures.") The court also found that the statute's use of the word "minimize" precluded the use of "mitigation" to satisfy the technology requirement with after-the-fact restoration measures. *Id.* (discussing that Webster's dictionary defines "minimize" as meaning to reduce to the smallest extent possible.) Thus, the Second Circuit rejected the restoration provisions in the rule, because "EPA impermissibly construed [an unambiguous] statute by allowing compliance with section 316(b) via restoration measures," such as restocking fish killed by a cooling water intake structure. *Riverkeeper II*, 475 F.3d at 108-10, App. 43a-50a; *see also Riverkeeper I*, 358 F.3d at 189. The court remanded this aspect of the Phase II rule to EPA as well.

Finally, based on a plain reading of section 316(b) and the opinions of its sister circuit courts on this point, the Second Circuit rejected Industry Petitioners' argument that section 316(b) is not applicable to existing facilities, and further held that EPA could reasonably choose to implement section 316(b) requirements through discharge permits. *Riverkeeper II*, 475 F.3d at 122, App. 74a ("given the cross-references in section 316(b) to provisions governing both new and existing facilities, the EPA's reading is far more reasonable than Entergy's.")

REASONS FOR DENYING THE PETITIONS

There are no compelling reasons to grant the petitions. First, the Second Circuit properly remanded the Phase II rule to EPA for further consideration. Significantly, EPA is actively addressing the Second Circuit's remand order, and thus, the reach and import of the opinion in *Riverkeeper II* is unclear with respect to the question of whether EPA's cost analysis will affect its BTA determination. Moreover, and, importantly, the fact that EPA did not seek either rehearing or an *en banc* consideration before the Second Circuit, and has not petitioned for certiorari, reflects the United States' judgment that the Second Circuit's decision does not merit review at this time.

Second, *Riverkeeper II* is the first decision to construe the technology requirement set forth in section 316(b) as it relates to cooling water intake structures at existing facilities. The court used accepted and usual principles of statutory construction to reject EPA's outdated cost-benefit analysis; to reject the use of restoration measures as a *substitute* for technology-forcing standards applied at the intake, and to conclude that section 316(b) applies to existing facilities as well as to new.

Finally, the decision in *Riverkeeper II* is not in conflict with any other circuit court or with this Court on any issue raised in the petitions. No other court has construed this language differently. Indeed, all of the conclusions reached in *Riverkeeper II* are

consistent with section 316(b) of the Clean Water Act, consistent with other circuit court opinions and consistent with the precedents of this Court.

For these reasons, this case does not warrant consideration by this Court.

I. THE SIGNIFICANCE OF *RIVERKEEPER II* IS UNCERTAIN BECAUSE EPA IS RECONSIDERING THE PHASE II RULE ON REMAND.

The Second Circuit properly remanded the Phase II rule to EPA, and significantly, EPA neither sought rehearing, or consideration *en banc* below, nor has it filed its own certiorari petition here. Instead, EPA suspended the Phase II rule, almost in its entirety, while it "considers how to address the remanded issues." 72 Fed. Reg. 37,107/2 (July 9, 2007).

The Second Circuit's remand was proper with respect to EPA's BTA and EPA's authorization of the use of restoration measures. With respect to EPA's BTA determination, the primary basis for the Second Circuit's remand was that it properly could not review EPA's selection of compliance options because both EPA's explanation for its underlying BTA determination in the rule, and the administrative record itself lacked the information needed to review

the rule.[4] Thus, the Second Circuit remanded these central cost provisions of the Phase II rule to EPA. *See Riverkeeper II,* 475 F.3d at 101-05, App. 28a-38a. The Second Circuit explained that EPA has the "correlative responsibility to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both." *Id.* at 104, citing *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 627 (1986), App. 35a. Absent such an explanation here, the Second Circuit directed EPA to provide "either a reasoned explanation of its decision or a new determination of BTA based on permissible considerations." *Id.* at 130, App. 93a; *see also id.* at 105, App. 37a (Second Circuit suggesting that, "EPA in reconsidering its selection of BTA on remand may alter the suite of technologies it originally selected.") Thus, the result of the cost analysis that EPA will perform in determining BTA, and whether the resulting BTA determination will change is uncertain.

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[4] *Riverkeeper II*, 475 F.3d at 101 ("the *record is unclear* as to the basis for the EPA's selection of the suite of technologies as BTA. . . ."); *id.* at 104 ("In a technical area of this sort, it is difficult for judges or interested parties to determine the propriety of the Agency's action *without a justification for the action* supported by clearly identified substantial evidence whose import is explained. The record evidence alone here, . . . is *oblique, complicated, and insufficient* to permit us to determine what the EPA relied upon in reaching its conclusion."); *id.* ("The EPA was required to *explain its judgment* and the basis for it. *It did not do so* here.") ("In short the *EPA's failure to explain* its decision *frustrates* effective *judicial review*.") (*Emphasis added*), App. 28a-36a.

With respect to the use of restoration, the Second Circuit correctly found the provisions of the Phase II rule that allowed facilities to comply with BTA requirements through after-the-fact attempts to restore already degraded water resources, to be inconsistent with the plain meaning of section 316(b). Still, the Second Circuit remanded the restoration provisions to be rewritten consistent with its decision.

While *Riverkeeper II* makes it clear that EPA cannot employ a cost-benefit analysis to determine BTA, or allow existing facilities to the use restoration measures in lieu of technology at the intake, to what degree or how these findings will affect EPA's final BTA determination is unclear. Only when the remand considerations are final, and the regulatory process complete, will the new requirements of the Phase II rule be potentially applicable to existing facilities. Only then, therefore, will the practical effect of the Second Circuit's decision on states, regulatory agencies, and permitted facilities be known.

Moreover, EPA has acknowledged that it "is precluded from applying the rule unless and until it takes further action to address the decision," stating directly, "[t]hus, today's action simply effectuates the legal status quo. . . ." 72 Fed. Reg. 37,107/3. Until EPA addresses the remand issues and promulgates a new final Phase II rule in response to the remand, Industry Petitioners are in the same position as a regulated community as they were before the Phase II rule was issued – as are the States. *Id.* (EPA directing that "until the Agency has considered and

resolved the issues raised by the Second Circuit's remand[,] [p]ermit requirements for cooling water intake structures at Phase II facilities should be established on a case-by-case best professional judgment (BPJ) basis.") Thus, the Phase II rule is in flux, and should not now be reviewed by this Court.

In short, prudence and discretion dictate that EPA be allowed to complete its reassessment of the cost-based determinations and restoration provisions in the Phase II rule before additional judicial resources are used in reviewing the evolving rule. Accordingly, this case does not merit this Court's attention.

II. *RIVERKEEPER II* IS A ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

The decision below involves an unexceptional, case-specific application of the principles that control when a court must defer to an agency interpretation. These guiding principles were articulated by this Court in *Chevron* and followed by the Second Circuit in *Riverkeeper II*. *See Riverkeeper II*, 475 F.3d at 95, App. 16a (starting its discussion with a correct statement of *Chevron's* two-step analysis).

Cost Considerations

In undertaking step-one of the *Chevron* analysis, the Second Circuit concluded that section 316(b) is unambiguous and does not permit EPA to conduct a

cost-benefit analysis in determining BTA for cooling water intake structures. The Second Circuit's opinion that a cost-benefit analysis is precluded under a routine construction of section 316(b) was based, in the first instance, on the language of section 316(b) itself, which the court stated, "plainly indicates that facilities must adopt the best technology available and that cost-benefit analysis cannot be justified in light of Congress' directive." *Riverkeeper II,* 475 F.3d at 98-99, App. 21a-26a. The court did not preclude EPA from all forms of cost consideration,[5] but found nothing in the unique text of section 316(b) itself that provides EPA with the authority to balance costs and environmental benefits when selecting BTA.

The Second Circuit also examined the ordinary meaning of the discharge provisions cross-referenced in section 316(b), and observed that, in light of the cross-references its ordinary reading of the technology standard in section 316(b) is also consistent with the technology-forcing nature of the discharge provisions. *See Riverkeeper II*, 475 F.3d at 98-99, App. 23a ("The BTA standard of section 316(b), . . . , is linguistically similar to the BAT standard of section 301 and the standard that applies to new sources under section 306"); *see also Riverkeeper II*,

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[5] The Second Circuit held that EPA may permissibly consider costs in two ways: (1) to determine what technology can be "reasonably borne" by the industry, and, (2) to engage in a cost-effectiveness analysis in determining BTA. *Riverkeeper II*, 475 F.3d at 99, App. 22a.

475 F.3d at 99-100, citing *Kennecott v. United States EPA*, 780 F.2d 445, 448 (4th Cir. 1985), App. 24a-26a ("In setting BAT, EPA uses not the average plant, but the optimally operating plant, the pilot plant which acts as a beacon to show what is possible"); *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) ("The most salient characteristic of the Clean Water Act's statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology forcing.")

The Second Circuit's construction of the statute with regard to the cost-benefit analysis does not break any new ground. Moreover, PSEG exaggerates the extent to which the Second Circuit relied on this Court's decision in *American Textile Manufacturers Institute, Inc. v. Donovan* ("*Donovan*"), 452 U.S. 490 (1981) to conclude that a cost-benefit analysis is not allowed under section 316(b). Even before referring to *Donovan* the court concluded that, "cost benefit analysis is not . . . supported by the language or the purpose of the statute." *Riverkeeper II*, 475 F.3d at 99, App. 24a. Section 316(b) directs EPA to select the best available technology for minimizing adverse environmental impact. The technology-forcing standard established in section 316(b) focuses on "available" technology and "minimization." Not straying from the textual reading of section 316(b), the Second Circuit turned to this Court's reasoning in *Donovan* and other opinions of this Court to provide support for the basic construction principle that Congress knows how to direct an agency to consider

costs and benefits. *See Donovan*, 452 U.S. at 509 ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.") The Second Circuit's decision is also consistent with the ordinary rule of statutory construction that "[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).[6]

The Second Circuit's conclusion that EPA may consider costs in a limited fashion when selecting BTA, but that a cost-benefit analysis is prohibited under the statute, was reached because the unique language in section 316(b) calls for the "minimization of adverse environmental impacts," and technology-forcing nature of the sections cross-referenced in section 316(b) unambiguously reflect Congress' intent to do away with the cost-benefit analysis. The court's opinion was the result of a textbook application of ordinary *Chevron* step-one principles. The Second

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[6] In *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 467-68, 121 S.Ct. 903, 909-10 (2001), this Court held that, "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not one might say hide elephants in mouseholes."

Circuit's opinion, on this point, does not warrant this Court's review.

Restoration

Section 316(b) provides that the "location, design, construction, or capacity of cooling water intake structures" must "reflect the best technology available for minimizing adverse environmental impacts." In concluding that section 316(b) does not authorize the use of restoration measures as a substitute for BTA, the Second Circuit again adhered to a step-one *Chevron* analysis, holding that "Congress unambiguously expressed its intent in the statute." *Riverkeeper II*, 475 F.3d at 110, quoting *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778, App. 48a ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") Based on a straightforward *Chevron* analysis, the court rejected the use of restoration measures for two reasons: (i) restoration measures cannot be used to curtail or reduce the impacts caused by the intake itself, as is required by section 316(b); and (ii) restoration measures do not *minimize* impacts, as is required by the statute, but rather are implemented with the hope that they will *mitigate* impacts after they have already occurred.

Industry Petitioners argue that the use of the word "reflect" in section 316(b) means that the approved technology does not have to be incorporated

into the intake structure itself. From here, Industry Petitioners imply that because other permissible technologies, such as barrier nets and cooling towers, are likewise not part of the intake structure, restoration measures are no different and should have been permitted. The Second Circuit addressed this argument squarely when it was raised by EPA in *Riverkeeper II* – the statute is clear, restoration measures simply are neither related to the intake characteristics listed in section 316(b), nor do they constitute technology that *minimizes* environmental impact. *See Riverkeeper II,* 475 F.3d at 110, App. 49a ("[A] rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting any cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle.")

Moreover, the Second Circuit observed that it had decided this very statutory construction issue in *Riverkeeper I* with respect to EPA's regulation of cooling water intake structures at new facilities:

> As we noted in *Riverkeeper I*, restoration measures substitute after-the-fact compensation for adverse environmental impacts that have already occurred for the minimization of those impacts in the first instance. The Agency's attempt to define the word "minimize" to include "compensati[on] . . . after the fact," 69 Fed. Reg. 41,628 *is simply inconsistent with that word's dictionary definition:* "to reduce to the smallest possible

> extent," Webster's Third New Int'l Dictionary 1438 (1986).

Riverkeeper II, 475 F.3d at 110 (*emphasis added*), citing *Riverkeeper I*, 358 F.3d at 189, App. 49a.

After this conventional textual analysis of section 316(b), the Second Circuit unanimously held, consistent with *Riverkeeper I*, that "EPA impermissibly construed the statute by allowing compliance with section 316(b) via restoration measures." *Id.*

Application to Existing Facilities

Entergy suggests that this case presents the opportunity for this Court to resolve whether an agency should be given deference when it interprets a statute that defines the scope of its authority. Entergy Pet. at 22. The question of whether section 316(b) applies to existing facilities is not a scope of authority issue – it simply required a straightforward reading of section 316(b) to determine whether *Congress* intended it to apply to existing facilities. Thus, EPA did not improperly assert, nor did it attempt to redefine the scope of its authority when it promulgated the Phase II rule pursuant to section 316(b).

Throughout the Clean Water Act, EPA's authority to regulate discharges indisputably extends to new and existing facilities alike. Indeed, it is well established that EPA is required by section 316(b) to promulgate regulations governing cooling water

intake structures at existing facilities in Phase II and III of its rulemaking process. *See Cronin v. Browner*, 90 F.Supp.2d 364 (S.D.N.Y. 2000).

The Second Circuit rejected Entergy's argument that the phrase "location, design, construction, and capacity," implicitly limits the applicability of section 316(b) to new facilities. It relied on the textual cross-references in section 316(b) to provisions that govern both new and existing facilities to conclude that section 316(b) articulates a single standard for both new and existing facilities. *Riverkeeper II*, 475 F.3d at 122, App. 74a-75a.

Entergy likewise argues that because section 316(b) neither dictates particular technologies to be used for cooling water intake structures, nor specifies a particular mechanism by which EPA is to implement its technology determinations under section 316(b), EPA is reaching beyond the scope of its authority in applying its regulations to existing facilities. This argument, too, is nothing more than a challenge to the deference that is afforded to EPA under step-two of its *Chevron* analysis. EPA has imposed intake requirements through discharge permits and the circuit courts have supported this implementation mechanism since the inception of the Clean Water Act.

In short, *Riverkeeper II* did not address the scope of EPA's authority, it addressed the applicability of section 316(b).

III. THERE IS NO SPLIT IN THE CIRCUIT COURTS ON ANY OF THE ISSUES RAISED BY INDUSTRY PETITIONERS.

Industry Petitioners argue that the Second Circuit's opinion in *Riverkeeper II* conflicts with the decisions of other circuit courts on three issues: whether section 316(b) precludes a cost-benefit analysis in determining BTA; whether section 316(b) sanctions the use of restoration measures as a substitute for technology-forcing standards; and whether section 316(b) applies to existing facilities, and in turn, can be implemented through discharge permits.

The Cost-Benefit Analysis

Industry Petitioners assert that the Second Circuit's opinion disregards a longstanding practice to allow cost-benefit analysis with respect to water intake regulation under section 316(b). PSEG Pet. at 24, 30. To support this assertion Industry Petitioners rely on *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979) ("*Seacoast*"). Specifically, PSEG and UWAG cite *Seacoast* for the principle that the use of a cost-benefit analysis in determining BTA has always been the norm. UWAG Pet. at 25-28; PSEG Pet. at 24-25. *Seacoast* however, did not address the permissibility of a cost-benefit analysis at all. Rather, the First Circuit concluded only that the statute's legislative history indicates that cost is an acceptable consideration in determining whether the intake design "reflects the best technology available." *Seacoast*, 597 F.2d at 311. Contrary to the Industry

Petitioners' arguments, *Seacoast* does not endorse a cost-benefit analysis nor prescribe one.

Moreover, in citing *Seacoast,* Industry Petitioners fail to recognize that the cost-benefit analysis for setting effluent limitations under section 301(b)(2)(A) was replaced by the more stringent "best available technology" standard, under which EPA may consider the cost of achieving a reduction in effluent, but not the cost of achieving the effluent reduction as compared to the benefit achieved by the reduction. In the context of section 316(b), the Second Circuit recognized the distinction between considering cost in determining BTA and balancing cost against the benefit to be achieved by BTA.[7] The Second Circuit found support for this distinction in this Court's decision in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980), where it recognized that the shift to BAT in section 301 fundamentally altered the way in which the EPA could factor cost into its Clean Water Act determinations. App. 21a. Thus, the Second Circuit's decision is not at variance with the *Seacoast* Court's dicta that cost is an "acceptable consideration" in determining whether an intake design reflects the best technology available. *Seacoast*, 597 F.2d at 311.

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[7] *Riverkeeper II*, 475 F.3d at 102, citing *Riverkeeper I*, 358 F.3d at 195, App. 30a ("Congress made only one distinction: while the Agency could consider the relationship between cost and benefits in establishing BPT, CWA Section 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B), it could consider cost insofar as it can be 'reasonably borne' by the industry, but not the relationship between cost and benefits, in establishing BAT.")

The Industry Petitioners also cite *BP Exploration & Oil, Inc.*, 66 F.3d 784 (6th Cir. 1995) and *Weyerhaeuser v. Costle,* 590 F.2d 1011 (D.C. Cir. 1978) in support of their claim of conflict among the circuits on the cost-benefit analysis issue. Entergy Pet. at 25-30; PSEG Pet. at 20-21. Neither case addressed the applicability of a cost-benefit analysis when establishing BTA under section 316(b).

In *BP Oil*, oil and gas industry petitioners challenged an EPA rulemaking that established pollution (effluent) discharge limitations promulgated under sections 301, 304 and 306. *BP Oil*. 66 F.3d at 789. Petitioners also challenged EPA's calculation of the cost of achieving the effluent limitations, but not EPA's failure to properly consider cost. In upholding EPA's rulemaking, the Sixth Circuit noted the factors, including cost, that EPA may consider in setting effluent limitations for an industry subject to "best available technology," and recognized that EPA was required to "institute progressively more stringent effluent discharge guidelines in stages." *Id*. Notably, the Court did not hold, or even suggest, that a cost-benefit analysis was proper in establishing such limitations and simply did not address the question of whether section 316(b) authorizes such an approach when determining BTA at an intake structure. Thus, *BP Oil* does not conflict with *Riverkeeper II* on the issue of cost-benefit analysis.

Similarly, there is no conflict presented by *Weyerhaeuser*, where petitioners challenged an EPA rulemaking setting effluent discharge limitations and

the calculated costs of implementation. Like *BP Oil,* the court in *Weyerhaeuser* did not address the question of whether a cost-benefit analysis under Section 316(b) is appropriate when establishing BTA for intake structures. Moreover, *Weyerhaeuser* predated the shift to best available technology recognized in *National Crushed Stone Ass'n. Weyerhaeuser* therefore presents no conflict with the decision in *Riverkeeper II.*

Nor do any of the other cases cited by the Industry Petitioners address the issue of whether Section 316(b) authorizes a cost-benefit analysis.[8] Thus they do not support the conclusion that there is a split among the circuit courts.

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[8] *See* UWAG Pet. at. 21, citing *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977) (upholding EPA NPDES permit against challenge that State law should apply); Entergy Pet. at 32, citing *Gulf Restoration Network v. United States Dept. of Transportation*, 452 F.3d 362, 372 (5th Cir. 2006) (upholding environmental review and license issuance under Deepwater Port Act); Entergy Pet. at 32-33, citing *American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 3 (D.C. Cir. 2002) (upholding EPA regional haze rulemaking under Clean Air Act); UWAG Pet. at 21, citing *United States Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977) (upholding EPA NPDES permit requiring monitoring at intake pursuant to Section 316(b) and finding assertion that EPA failed to compare costs and benefits of intake technologies not ripe).

Restoration

Industry Petitioners argue that there is also a conflict among the circuit courts with respect to whether restoration measures are a permissible substitute for technology at the intake structure under section 316(b). In fact, the Second Circuit in *Riverkeeper I* was the first to directly address this issue. *Riverkeeper I*, 358 F.3d at 189-91. *Riverkeeper I* rejected inclusion of restoration measures in lieu of technology at the intake at new facilities under the Phase I rule in light of the plain language of section 316(b). *Id.* at 191. The Second Circuit's decision to reject restoration here in the Phase II rule is based on the same analysis.

Industry Petitioners cite *Seacoast*, 597 F.2d at 309-11, in support of their claim that there is a split between the First and Second Circuits. PSEG Pet. at 28-29. Because *Seacoast* does not address whether section 316(b) authorizes restoration measures in lieu of technology at the intake, however, it is not in conflict with *Riverkeeper I* and *Riverkeeper II*.

Industry Petitioners also suggest that the Second Circuit is departing from a broad national consensus and that the Second Circuit decision threatens EPA's practice of requiring restoration measures in many environmental contexts, including the National Environmental Policy Act ("NEPA"), the Clean Water Act Section 404, the Endangered Species Act, and the Fish and Wildlife Coordination Act. PSEG Pet. at 30-31. Petitioners argue that many courts have affirmed

a federal agency's discretion to consider restoration in those contexts. This argument is erroneous. These decisions, which address restoration measures under distinct federal statutes, do not give rise to a conflict among the circuit courts on whether section 316(b) allows restoration measures in lieu of best technology available at intake structures. Moreover, none of the referenced statutes have the distinct and isolated provision mandating that EPA select a technology based on its ability to "minimize" adverse environmental impacts.

Petitioners also misconstrue the Second Circuit's holding with respect to restoration as a policy matter. The Court recognized that restoration measures could be beneficial, but held that EPA could not substitute restoration measures in place of technology at an intake structure. That holding does not undermine the importance of restoration or the ability of EPA or the States to use restoration measures in addition to the appropriate technology requirements at the intake as mandated by section 316(b).

Existing Facilities

Petitioner Entergy argues that there is a split among the circuit courts with respect to whether section 316(b) applies to existing facilities, and whether cooling water intake standards can be regulated in discharge permits. Contrary to Entergy's claim, the Second Circuit's holding did not expand the application of section 316(b) beyond its text, nor did it

equate the intake requirements of section 316(b) with discharge requirements of sections 301 and 306.

The courts have long recognized that section 316(b) applies to "existing" cooling water intake structures as well as to "new" structures, and that the National Pollutant Discharge Elimination System ("NPDES") permitting program is an appropriate mechanism for implementation. *See Riverkeeper II*, 475 F.3d at 122, quoting *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 121 (1977), App. 74a ("Section 301(b), to which section 316(b) expressly refers, defines the effluent limitations that shall be achieved by existing point sources."); *see also United States Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977). The plaintiff, like Industry Petitioners here, argued that the requirements of section 316(b) applied only to a certain category of power plants, and that EPA could not impose section 316(b) requirements as a condition of NPDES permits. *See id.* at 849. The Seventh Circuit disagreed, holding that section 316(b) applies on its face to all technology-based requirements of the Clean Water Act. *Id.* at 849-50. The Seventh Circuit went on to confirm that the proper mechanism for implementing the requirements of section 316(b) was through conditions imposed in NPDES permits. *Id.*, citing *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1371-72 (4th Cir. 1976).

Entergy's contention that *Riverkeeper II* creates a conflict with *Virginia Electric Power Co. v. Costle*, 566 F.2d 446 (4th Cir. 1977) is also incorrect. The issue in

Virginia Electric was a narrow one – whether the circuit courts had jurisdiction to review agency regulations issued pursuant to section 316(b) of the Clean Water Act. Entergy cites isolated language in the case for the proposition that section 316(b) regulations are not effluent limitations. But that issue was not in dispute there, *see id.* at 449, nor is it in dispute here. In fact, the Fourth Circuit's decision supports the proposition that section 316(b) intake technology requirements apply to existing facilities. Furthermore, the court, and the industry petitioners in that case, implicitly recognized that section 316(b) regulations could be implemented for existing facilities through NPDES permitting processes. *See id.* at 449.

Nor does *Riverkeeper II* create a conflict with *Natural Resources Defense Council v. EPA*, 859 F.2d 156 (D.C. Cir. 1988), as Entergy maintains. The issue before the D.C. Circuit there was whether EPA could impose non-water quality permit conditions in a NPDES discharge permit. EPA asserted that the National Environmental Policy Act ("NEPA") provides it with "supplemental authority" not only to consider additional environmental factors, "but to act on these factors by imposing any condition necessary to account for the environmental effects of the new facility." *Id.* at 169. The court concluded that EPA could not look to NEPA to expand its substantive powers. It held that "[a]ny action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)." *Id.* In contrast,

EPA here is acting within its express authority under section 316(b) of the Clean Water Act in promulgating standards that require "cooling water intake structures [to] reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. §1326(b).

CONCLUSION

For the foregoing reasons, the Industry petitions for a writ of certiorari should be denied.

Respectfully submitted,

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